The Wrong Stuff

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A member of the *BYU Law Review* called a few months back and invited me to address you today. "Sure," I said, "I'll do it, but what can I possibly talk about that would be of interest to the students and faculty of BYU Law School?" "Why don't you juggle some porcupines or pull a piano out of a hat?" the law review member replied. "The truth is, we don't really care *what* you say; what we really want is the cover boy from *California Lawyer*."

Well, I have my pride. I don't want to be lumped in with the Tom Cruises and Kevin Costners of the world. I want to be loved for my intellect, not just my face. So I decided this is my opportunity to shed that go-go image by giving a speech on the dullest topic possible. *The Mating Habits of the Human Tapeworm* and *The Use and Abuse of "Thou" in the King James Version of the Bible* were among the possibilities I considered. The problem is that I don't know anything about those subjects. Instead, I decided to talk on a totally irrelevant topic that I know a little something about: How to Lose an Appeal.

Now, you might agree that I hit upon the ideal irrelevant topic, for how many lawyers would actually want to lose a case, particularly on appeal? But my law clerks pointed out that there might actually be such cases; history provides at least one well-documented example.

It happened right after Lyndon B. Johnson's Senate primary campaign in 1948. Now we're talking about the heyday of good ole boy politics: when a Texan so cherished his right to vote he exercised it as many times as possible, often in the same election. Anyway, some of LBJ's boys got caught with their fingers in the ballot box and a federal judge issued an

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injunction keeping Johnson off the ballot in the general election. Naturally, LBJ was agin it, so he ordered his boys to figure out a way to get rid of that little ol' injunction before the election. The problem was that the Fifth Circuit was likely to sit on the case for a while, so even if they eventually held for LBJ it would turn out to be too late.

One of LBJ's boys, a guy named Abe Fortas, came up with a creative solution: throw the appeal. Why take chances on what some crotchety Fifth Circuit judge might do when you could be pretty sure of getting Justice Black to issue a stay? So old Abe wrote a stinker of a brief and presented it to a circuit judge Abe knew was predisposed to deny the stay. Sure enough, the plan worked and Johnson eventually became president—and appointed Abe Fortas to the Supreme Court.

Now, I know that every one of you out there has Supreme Court ambitions—don't deny it—so when that once-in-a-lifetime career opportunity knocks and you are required to lose an appeal, will you have what it takes to do the pooch? Not to worry; I'm here to tell you that you too can lose an appeal, no matter how good your case. But don't try to improvise; what I'm about to give you is the tried and true stuff, honed over years of bitter experience.

First, you want to tell the judges right up front that you have a rotten case. The best way to do this is to write a fat brief. So if the rules give you 50 pages, ask for 75, 90, 125—the more the better. Even if you don't get the extra pages, you will let the judges know you don't have an argument capable of being presented in a simple, direct, persuasive fashion. Keep in mind that simple arguments are winning arguments; convoluted arguments are sleeping pills on paper.

But don't just rely on the length of your brief to telegraph that you haven't got much of a case. No. Try to come up with something that will annoy the judges, make it difficult for them to read what you have written and make them mistrust whatever they *can* read. The possibilities are endless, but here are a few suggestions: Bind your brief so that it falls apart when the judge gets about half way through it. Or you could try a little trick recently used by a major law firm: Assemble your brief so that every other page reads up-side down. This is likely to induce motion sickness and it's always a fine idea to have the judge associate your argument with nausea. Also—this is a biggie—make sure your photocopier is low on toner or scratch the glass so it will put annoying lines on every

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page. The judge won't even be able to decipher what you wrote, much less what you meant.

Best of all, cheat on the page limit. The Federal Rules of Appellate Procedure not only limit the length of the briefs, but also indicate the type size to be used. This was pretty easy to police when there were two type sizes—pica and elite. But these days it is possible to create almost infinite gradations in size of type, the spacing between letters, the spacing between lines and the size of the margins.

Now if you don't read briefs for a living, one page of type looks pretty much like another, but you'd be surprised how sensitive you become to small variations in spacing or type size when you read 3,500 pages of briefs a month. Chiseling on the type size and such has two wonderful advantages: First, it lets you cram in more words, and when judges see a lot of words they immediately think: LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief. But there is also a second advantage: It tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority.

So, if you do things just right, you will submit an enormous brief with narrow margins and tiny type, copied with a defective photocopier onto dingy pages, half of which are bound upside down with a fastener that gives way when the judge is trying to read the brief at 35,000 feet. You can lose your appeal before the judge even reads the first word.

But what if you think the judges might nevertheless read your brief and find a winning argument? You go to step two. Having followed step one, you already have a long brief, so you can conveniently bury your winning argument among nine or ten losers. I saw a wonderful example of this recently. It was the duel of the Paul Bunyons; who could fell more trees in pursuit of their cause? There were several appeals, motions and petitions for extraordinary writs—the whole shebang. What there was not was a winning argument, until a diligent law clerk searched through the rubble and found an issue that stood a good chance of winning.

Now, eager beaver law clerks like that don't come along in every case, but still there's a risk: What if a clerk—maybe even the judge—should happen to stumble onto your winning argument? To guard against this, winning arguments should not only be buried, they should also be written so as to be

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totally unintelligible. Use convoluted sentences; leave out the verb, the subject, or both. Avoid periods like the plague. Be generous with legal jargon and use plenty of Latin. And don't forget the acronyms in bureaucratese. In a recent brief I ran across this little gem:

> LBE's complaint more specifically alleges that NRB failed to make an appropriate determination of RTP and TIP conformity to SIP.

Even if there was a winning argument buried in the midst of that gobbledygoop, it was DOA.

But let's face it, a good argument is hard to hold down. So what you want to do is salt your brief with plenty of distractions that will divert attention from the main issue. One really good way of doing this is to pick a fight with opposing counsel. Go ahead, call him a slime. Accuse him of lying through his teeth. The key thing is to let the court know that what's going on here is not really a dispute between the clients. No, that's there just to satisfy the case and controversy requirement. What is really going on here is a fight between the forces of truth, justice, purity and goodness—namely you—and Beelzebub, your opponent.

The reality, you see, is that most legal disputes are dreary dull, but everyone loves a good fight, particularly when the gloves come off. I often find myself chortling with delight when I read a passage such as this from a recent appellee's brief:

> With all due respect for my colleague, I have to tell this court that it's been told an incredible fairy tale, packed with lies and misrepresentations.

Of course, the other lawyer responded in kind. Pretty soon I found myself cheering for the lawyers and forgot all about the legal issues.

But let's say your opposing counsel is too smart to get into a hosing contest with you. No matter. You can always create a diversion by attacking the district judge. You might start out by suggesting that he must be on the take because he ruled against you. Or that he is senile or drunk with power, or just plain drunk. Chances are I'll be seeing that district judge soon at one of those secret conferences where judges go off together to gossip about the lawyers. I find that you can always get a real chuckle out of the district judge by copying the page where he is described as "a disgrace to the robe he wears" or as

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"mean-spirited, vindictive, biased and lacking in judicial temperament" and sticking it under his nose right as he is sipping his hot soup. District judges love to laugh at themselves, and you can be sure that the next time you appear in his courtroom, the judge will find some way of thanking you for the moment of mirth you provided him.

But let's say you have such an excellent case that despite all of this, you are still likely to win, if only the judges read the relevant statutory language. Well that's easy: Don't quote the language; don't append it to your brief. In fact, don't even cite it. What you want to do is start out by discussing policy. Judges love policy; it gives us a sense of power. So instead of talking about what Congress did, talk about what it *should* have done. Then cite a bunch of floor statements, particularly from those Senators or Representatives who opposed the legislation. Finally, include large block quotes from the testimony of witnesses before a committee considering similar legislation but in a different Congress.

Block quotes, by the way, are a must; they take up a lot of space but nobody reads them. Whenever I see a block quote I figure the lawyer had to go to the bathroom and forgot to turn off the merge/store function on his computer. Let's face it, if the block quote really had something useful in it, the lawyer would have given me a pithy paraphrase.

Now, assuming you have taken my advice to heart and done everything just right—or rather just wrong—pretty soon you'll get confirmation of the fruit of your efforts. Sometime after the briefing is completed, you'll receive an order notifying you that your case has been submitted on the briefs. Once you get this notice, you can kick off your shoes, relax, and start working on your cert petition; an unpublished disposition flushing your case is practically in the mail.

But let's say the unthinkable happens and you get notice the case is scheduled for argument. Well, then you have to start sweating. In our court, cases get taken off the argument calendar only if all three judges agree. So getting an oral argument notice indicates that, despite your worst efforts, at least one of the judges thinks there might be a spark of life in your appeal. This means you'll have to move to phase three, and this time you can't take any chances.

Now most lawyers will say, "Look, you don't have to tell us how to make a bad argument: you just get up and stutter, or insult the judges, or ignore their questions." Well, those might

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be good ways of getting you chewed out, but it won't necessarily kill your case. No, bad oral advocacy takes preparation and practice; like doggerel poetry, it also requires some imagination.

The first thing you must do at this stage is know the record like the back of your hand. There is a quaint notion out there that facts don't matter on appeal—that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, *except* as it applies to a particular set of facts. So you will find that judges at oral argument often have a lot of questions about the record. Which makes sense. After all, we can read the cases just as well as you can. Often, one or another of the judges has written the key case, so what can the lawyer really contribute to the panel's understanding of it?

But each case is different insofar as the facts are concerned; where the lawyer can really help the judges—and his client—is by knowing the record and explaining how it dovetails with the various precedents. Familiarity with the record is probably the most important aspect of appellate advocacy.

Now this is all good and well, you will say, if you're trying to *win* on appeal, but why bother knowing the record if you're trying to lose? Well, it's simple: you have to know where the gold nuggets are hidden so that you can skillfully divert the judges' attention away from them. By the same token, if the judges start delving into an irrelevant portion of the record, you want to keep them talking about that.

Now a principle very few lawyers seem to grasp is that there are no perfect cases, or very few indeed. By the time a case gets up on appeal, there is usually some validity to each side's position, and there are some holes or flaws in even the best case. Nevertheless, this isn't soccer or hockey; there are no tie scores. In a competition between two imperfect cases, the winner winds up being the case that is second-worst.

A good way to improve your chances of losing is to overclaim the strength of your case. When it's your turn to speak, start off by explaining how miffed you are that this farce—this travesty of justice—has gone this far when it should have been clear to any dolt that your client's case is ironclad. Now the reason this is a good tactic is that it challenges the judges to get you to admit that there is just some little teensy-weensy weakness in your case. So if you overstate your case

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enough, pretty soon one of the judges will take the bait and ask you a question about the very weakest part of your case. And, of course, that's precisely what you want the judges to be focusing on—the flaws in your case.

Now, having directed the judge's attention exactly where you want it, you have to press your advantage—or rather your disadvantage—by seeing if you can turn the judge into an advocate for the other side. After all, you know darn well that after oral argument the judges go off to a little room and decide your case. What better way to assure a loss than to get one of the judges to become an advocate for your opponent?

So how do you turn that flickering spark of interest into a firestorm that will reduce your argument to ashes? What I have found works really well under such circumstances is this: once the judge starts to ask a question, raise your hand in a peremptory fashion and say, "Excuse me, your honor, but I have just a few more sentences to complete my summation and I'll be happy to answer your questions." This will give the judge a chance to dwell on the question, roll it around in his mind and brood about it. If you're clever you never *will* get back to the judge's question. Let the judge stew while you keep droning on about how airtight your case is and how silly it is to even be arguing about it.

After a while the judges will catch on that you plan to use up your time by yakking rather than answering questions and they will start getting more insistent. When you feel you've got them good and lathered, move into the next phase: stonewalling. What you want to avoid at all costs is giving a short, direct answer to the question. Instead, tease the judge, equivocate, make him rephrase the question. The point is to get the judge really committed to the question so that the lack of a good answer will take on monstrous significance. A good way to start is by ridiculing the question: "I was afraid the court would get sidetracked down a blind alley by this red herring." Mixing metaphors, by the way, is always a good idea; it makes it look like you're spinning your wheels after you've missed the boat because you went off on a wild goose chase.

An alternative to stonewalling—and one of my personal favorites—is cutting off a judge's question. Doing this gives you several important advantages. First, it's rude, and if you're out to lose your case, there is really no substitute for offending the guy who's about to decide your case. Beyond that, cutting off the judge mid-question sends an important message: Look here

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your honor, you think you're so clever, but *I* know exactly what is going on inside that pointed little head of yours. Then again, cutting the judge off gives you an opportunity to answer the wrong question. When I pointed this out to a lawyer one time, he told me, "Well, if that's not the question you were asking, it *should* be." And finally, cutting in with an answer while the judge is still phrasing the question gives you an opportunity to answer without thinking—always a good idea if you want to come up with something really stupid.

The next oral argument ploy involves the record. As I said before, it's important for you to know the record just so you can tell when the judge is getting anywhere near that winning argument. But there is a big difference between knowing the record and sharing your knowledge with the judge. It helps to keep your understanding of the record a big secret; this will give the judge and his clerks a chance to go chasing through the fourteen boxes of documents looking for that needle in the haystack. Here is a good example of how best to handle inquiries about the record if the judge gets too insistent:

> JUDGE (exasperated): Look counsel, you claim there is no disputed issue of fact on this point, but isn't it true that the affidavit of Joe Smith, submitted by opposing counsel, directly contradicts your client's affidavit?
>
> LAWYER: Well, your honor, I'm not really sure.
>
> JUDGE: Let's not guess. The affidavit appears at page 635 of the Excerpts of Record. Why don't we read it together and you can explain to me what it says.
>
> LAWYER: Your honor, I don't have the Excerpts.
>
> JUDGE: That's OK, counsel, you can go over to your briefcase and bring it to the lectern. I'll wait.
>
> LAWYER: Well, what I mean, your honor, is I didn't bring the Excerpts with me to court.
>
> JUDGE: I see; well, what did you think we were going to do here today, have coffee and donuts and talk about the weather?
>
> LAWYER: To be truthful, I thought we were going to talk about the law. I wasn't counsel in the district court so I'm not really all that familiar with the record, but if you say the affidavit is in there, how can I deny it?
>
> JUDGE: Well, let's talk about the law then. Isn't it the law that you can't get summary judgment if there is a disputed

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issue of fact? And the affidavit seems to establish a disputed issue of fact.

LAWYER: But that's true only if you believe the affidavit. I can tell you for a fact it's a lie. In any event it's hearsay since it describes out of court conduct, and it's not the best evidence.

By this time you can probably see steam coming out of the judge's ears, which is a good time to move onto your next tactic: start making a jury argument. The truth is that oral argument can be tiring and the judges need a little comic relief once in a while. Few things are quite as funny as hearing an appeal to passion during an appellate argument. But if you try it, remember that a jury argument is no good at all unless you have the client (and his wife) sitting in the front row nodding. Of course, a lot of clients are not very sympathetic looking, which is all right because appellate judges have no way of knowing what your client really looks like. So you could just pay some sympathetic looking homeless person twenty bucks to sit in the front row and nod.

When a lawyer resorts to a jury argument on appeal, you can just see the judges sit back and give a big sigh of relief. We understand that you have to say all these things to keep your client happy, but we also understand that you know, and we know, and you know we know, that your case doesn't amount to a hill of beans, so we can go back there in the conference room and flush it with an unpublished disposition.

* * * *

Well, I could go on and on with this topic, but it seems to me that if you win your case after all the pointers I've given you, you ought to give up practicing law and start playing the lottery. But for most of you it *will* work. So when the call comes and you get ready to follow in the footsteps of Abe Fortas, you too can prove you have The Wrong Stuff.

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